2011 IL App (1st) 092257-U

THIRD DIVISION
September 30, 2011

No. 1-09-2257

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 10904
	)	
DERICK LEWIS,	)	Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justice Murphy and Justice Salone concurred in the judgment.

O R D E R

HELD: Where the trial judge responded to a jury question with an accurate and specific statement of the law and did not suggest defendant could be convicted on an accountability theory, the judge's response did not constitute error so as to permit plain error review; defendant's convictions were affirmed.

¶ 1 Following a jury trial, the defendant, Derick Lewis, was convicted of one count of robbery and three counts of

aggravated criminal sexual assault. The aggravated nature of the sexual assault charges was based on the completion of various sex acts during the commission of the robbery. Defendant was sentenced to 10 years for robbery and to 12 years for each sexual assault conviction, all to be served consecutively, for a total sentence of 46 years in prison. On appeal, defendant contends the trial court's response to a jury question constituted plain error by permitting the jury to convict him of aggravated criminal sexual assault without finding that he personally committed the robbery. Defendant also seeks correction of the mittimus. We affirm defendant's convictions and sentence but order the mittimus to be corrected.

¶ 2 The following relevant facts were presented at defendant's trial. T.W., the victim, testified that at about 4 a.m. on April 16, 2007, she accepted a ride from defendant. Calvin Kelly and another man were in the back seat. The victim, who was 19 years old, testified she got out of the car after several minutes because the men's comments were making her "uncomfortable."

¶ 3 The victim testified that as she waited at a bus stop, defendant drove by, and she again got into his vehicle, which at that point contained only defendant and Kelly. She and defendant sat in the back seat while Kelly drove. Defendant and the victim argued, and defendant pushed her several times. They arrived at Kelly's apartment, where she willingly followed them inside.

¶ 4 Two women, Keisha Burton and Latoya Carlton, were sleeping in the apartment. According to both the victim and defendant, the women woke up and spoke to defendant in a bedroom. The women then attacked the victim. The victim testified that after defendant broke up the altercation and led her to a bathroom to wipe blood from her clothing and face, he told her to take off her clothes or he would "put those girls back on you," meaning he would have the women attack her again.

¶ 5 The victim testified that defendant then sexually assaulted her in the bathroom. She denied accepting money and agreeing to have sex with defendant and/or Kelly. Upon returning to the living room, defendant demanded that she give him money. She gave defendant $30 from her purse, which she had left on a table. She noticed her phone and bus card were missing from her purse and asked the women and Kelly if they had seen those items. They replied they had not. Defendant and Kelly left the apartment.

¶ 6 The victim testified that the women forced her to go to McDonald's with them and their neighbor, Walter Clark, to buy breakfast, and they all returned to the apartment building. After she told Clark she had been assaulted, the police were called and she was taken to a hospital, where she identified defendant from a police photo array. Defendant, Kelly, Burton and Carlton were taken into custody. Later that day, the victim identified the defendant in a lineup.

¶ 7 Clark gave testimony generally consistent with the victim's account. Clark said Burton gave him $20 to drive the victim to a nearby currency exchange, where Clark told a teller that the victim had been raped and needed help. A clerk at the currency exchange offered testimony that corroborated Clark's account.

¶ 8 Chicago police officer Debra Gills testified that she responded to the call, drove to the currency exchange and went to Kelly's apartment after interviewing the victim. Another officer recovered the victim's cell phone from under a mattress in the apartment. Kelly, Burton and Carlton were arrested for robbery.

¶ 9 Kelly and Carlton both testified for the State. Kelly testified that defendant offered to pay the victim for sex and she agreed. Kelly said he did not have sex with her at the apartment because Burton, his girlfriend, was present. Kelly heard defendant and the victim have sex in the bathroom and heard defendant ask her for money when they returned to the living room.

¶ 10 Kelly denied taking anything from the victim's purse but stated he kept a bus card and cell phone that Burton or Carlton retrieved from the floor and placed on the counter. Kelly disavowed the following portion of the statement memorialized by an assistant State's Attorney the day after these events: that the women searched the victim's purse while she and defendant were in the bathroom and that Burton gave him her cell phone.

¶ 11 Carlton testified that at the time of defendant's trial, she was on probation for robbery in the instant case. She admitted she and Burton attacked the victim and heard defendant order the victim to go into the bathroom with him and to do what he said. After defendant and the victim returned to the living room, defendant demanded money from the victim, which she took out of her purse. When asked if she saw a cell phone, Carlton stated she saw it "that morning when [Kelly] put it under the bed." She said the victim was looking for the phone before they left the apartment.

¶ 12 Carlton said they gave the victim money for a bus pass because the victim did not have hers and did not want them to take her home. On cross-examination, Carlton said she pled guilty to robbery in this case because she "wanted to get out of jail because I was sitting in there for six months for something that I didn't do."

¶ 13 Chicago police detective Arthur Taraszkiewicz testified that he interviewed Kelly and Carlton. Kelly said Carlton and Burton attacked the victim in the apartment and he took the victim's cell phone away from Carlton so she could not call police. Although Kelly first told the detective the bus card belonged to him, he later said he retrieved the card from the floor after the women attacked her.

¶ 14 In the defense case, defendant testified that the victim accepted the ride after he told her he and Kelly wanted to

have sex with her and she got out of the car when they ultimately disagreed on a price. When she got in the car a second time, he gave her $60 and they discussed "partying," a term understood to include sex.

¶ 15 At the apartment, Carlton and Burton attacked the victim, and he helped her into the bathroom to clean up. Defendant testified that the victim then performed the sex acts in the bathroom that they had agreed upon earlier. When they came out, she returned $30 to defendant because she did not have sex with Kelly.

¶ 16 At the close of evidence, the jury convicted defendant of robbery and three counts of aggravated criminal sexual assault, based on various sexual acts. Additional facts will be set forth below as they relate to the issues raised on appeal.

¶ 17 On appeal, defendant contends that a new trial is warranted because the trial court's response to a jury inquiry during deliberations constituted plain error. He argues the response failed to clarify the jury's apparent confusion regarding the applicable law.

¶ 18 After the jury deliberated for about an hour, it sent a note to the judge at 1:35 p.m. which read as follows:

> "In order for the jury to find the defendant guilty of Aggrevated [sic] Criminal Sexual Assault does the person

> who committed the criminal sexual assault have to be the same person who commits the robbery."

¶ 19 The judge informed counsel for each side of the jury's inquiry and asked for their positions as to how he should respond. The State asserted the jury instructions were clear. Defense counsel argued the jury was having a "difficult time" with the instructions and "we think you should answer whatever words you would like." Defense counsel asserted the question should be answered "in the affirmative, because in this particular case, that is their only option to find him guilty."

¶ 20 The following discussion then took place:

> "THE COURT: I am going to give you my proposed answer and then I'll take comments on it. In order to find the defendant guilty of aggravated criminal sexual assault, you must reach a verdict of guilty on the robbery charge."
>
> MS. CARBELLOS [assistant public defender]: That's fine.
>
> THE COURT: I mean, that correctly states the law, because if they can't find him guilty of robbery, they can't find him guilty of aggravated criminal sexual assault.

MS. PAPA [assistant State's Attorney]: Exactly how I argued it, your Honor, so, I guess, yes.

MS. CARBELLOS: Judge we would prefer that you say yes, it must be the same person, because the way you are answering it, and I apologize to the Court now; it's as though okay, if you want to find him guilty of [the] sex charge, then you're going to have to find him guilty of the robbery, and they may say okay, even though they don't want to.

THE COURT: Oh, I don't know what they may or may not do, I can't deal with speculation. If they read the robbery issues instruction, the robbery issues instruction, well not on the record, but the State pointed out that the defendant did so by the use of force and that the defendant took the property, not Keisha or not Latoya or not Mr. Kelly. So I believe my answer correctly states the law, I guess we will find out if it clears it up for them.

MS. CARBELLOS: Would you consider making another note and ask them to refer to the propositions that have already been given to them?

MS. SCHECK [assistant State's Attorney]: I don't think we need to add extra.

THE COURT: I'm going to just answer the question. I'm going to add an extra sentence, because I don't want it to be said that I'm only talking about a guilty verdict form. So I'll put in order to find the defendant guilt [sic] of aggravated criminal sexual assault, you must reach a verdict of guilty of robbery. I will put in if you find defendant is not guilty of robbery, then you must find him not guilty of aggravated criminal sexual assault. Does the defense object to that?

MS. CARBELLOS: Defense does not."

¶ 21 The court's response was dated 2:14 p.m. and read as follows:

"In order to find the defendant guilty of Aggravated Criminal Sexual Assault you must reach a verdict of guilty of Robbery. If you find the defendant not guilty of Robbery, you must find him not guilty of Aggravated Criminal Sexual Assault. Please continue to deliberate."

¶ 22 At 2:25 p.m., the jury requested transcripts of the testimony of Carlton and the victim. After discussion with counsel for both sides, the court sent those transcripts to the jury at 2:40 p.m. Within the next hour, the jury returned the guilty verdicts.

¶ 23 Defendant acknowledges that, as the above-quoted colloquy demonstrates, his trial counsel expressly agreed to the judge's response, though counsel later challenged the response's validity in a post-trial motion. Defendant raises two arguments for the consideration of the issue despite his apparent failure to preserve this contention: (1) excusal of his forfeiture; or (2) plain error.

¶ 24 First, defendant argues this court should not consider his current argument forfeited because it is based on the conduct of the trial judge, i.e., the judge's response to the jury note. This rule, known as the Sprinkle doctrine, was used in People v. Dameron, 196 Ill. 2d 156, 171 (2001), on which defendant partially relies. See also People v. Sprinkle, 27 Ill. 2d 398, 400-01 (1963).

¶ 25 Supreme court case law makes it clear that the relaxation of the forfeiture rule allowed by Sprinkle "is warranted when the trial court has overstepped its authority in the presence of the jury or when counsel is effectively prevented from objecting as any objection would have 'fallen on deaf ears.' " People v. Hanson, 238 Ill. 2d 74, 118 (2010), quoting People v. McLaurin, 235 Ill. 2d 478, 488 (2009). The exceptions expressed in Hanson and McLaurin are not applicable here. Defense counsel clearly had the opportunity to object to or voice displeasure with the court's response to the jury question. Counsel was asked more than once to

weigh in on the appropriateness of the court's response, and counsel stated its agreement with the court's answer.

¶ 26 Defendant next claims his current contention can be considered under the plain error doctrine. A defendant normally forfeits review of a purported error involving jury instructions if he does not object to the instruction, or offer an alternative, and also fails to raise the issue in a post-trial motion. People v. Cotton, 393 Ill. App. 3d 237, 256 (2009). Under plain error, however, this court may consider a forfeited claim when: (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the strength of the evidence. People v. Piatkowski, 225 Ill. 2d 551, 565 (2007).

¶ 27 The first step of plain error analysis is to determine whether a clear or obvious error occurred. Piatkowski, 225 Ill. 2d at 565. It is the defendant's burden to demonstrate error. People v. Herron, 215 Ill. 2d 167, 187 (2005).

¶ 28 The trial court has a duty to provide instruction to the jury when it has posed an explicit question or requested clarification on a point of law arising from facts about which

there is doubt or confusion. People v. Brooks, 187 Ill. 2d 91, 138 (1999); People v. Childs, 159 Ill. 2d 217, 228-29 (1994). This is true even when the jury was given the proper instructions originally. People v. Cortes, 181 Ill. 2d 249, 280 (1998). If the question asked by the jury is unclear, it is the court's duty to seek clarification (Childs, 159 Ill. 2d at 229), and the court must respond to the jury with specificity and accuracy. People v. Shaw, 186 Ill. 2d 301, 320 (1998); People v. Jones, 364 Ill. App. 3d 740, 748 (2006).

¶ 29 Although defense counsel expressly agreed to the court's response to the jury's question, defendant now asserts the jury's inquiry exhibited its "confusion regarding the possibility of finding [him] guilty by accountability." Defendant argues the court's response did not adequately explain to the jury that it could not convict defendant for either charged offense if it determined that someone other than defendant committed a robbery by taking the victim's cell phone, bus pass or money from her purse. Defendant points out that shortly after the jury received the court's response to its question, the jury requested transcripts of the testimony of the victim and Carlton, and moreover, the jury heard Carlton testify that she pled guilty to robbery.

¶ 30 Defendant's arguments on appeal appear to disregard the elements of robbery that were argued at trial and the instructions the jury was given. In opening statement, the prosecution asserted

that defendant took money from the victim after committing the sexual assault and the others in the apartment also "help[ed] themselves" to the victim's personal property. In closing argument, the prosecution asserted defendant committed a robbery when he demanded money after having sex with the victim.

¶ 31 The jury was given the following definitional instruction for aggravated criminal sexual assault: "A person commits the offense of aggravated criminal sexual assault when he commits criminal sexual assault and the criminal sexual assault is perpetrated during the course of the commission of the offense of robbery." In a separate instruction setting out the elements of that offense, the jury was instructed it must find, inter alia, "that the act of sexual penetration was perpetrated during the course of the commission of the offense of robbery by the defendant."

¶ 32 As to robbery, the jury was instructed: "A person commits the offense of robbery when he knowingly takes property from the person or presence of another by the use of force or by threatening the imminent use of force." In the elements instruction, the jury was told:

> "To sustain the charge of robbery, the State must prove the following propositions: First, that the defendant knowingly took property from the person

> or presence of [the victim's name]; and second, that the defendant did so by the use of force or by threatening the imminent use of force."

¶ 33 In its question during deliberations, the jury asked whether, to sustain a conviction for aggravated criminal sexual assault, the person who committed the sexual assault had to be the same person who committed the robbery.

¶ 34 Defendant argues this case is comparable to People v. Morris, 81 Ill. App. 3d 288, 291 (1980), in which the defendant was granted a new trial based on the court's response to a jury question seeking an explanation of the legal theory of accountability. The defendant in Morris was arrested and charged with burglary after being found in possession of stolen items while driving away from the victim's home, even though no evidence was presented that the defendant had entered the residence. Morris, 81 Ill. App. 3d at 288-89. The jury in Morris was not instructed on the law of accountability, and the State did not argue the defendant's guilt based on an accountability theory; however, the jury was instructed, over the defense's objection, that it could infer the defendant's participation in the burglary based on his possession of recently stolen items. Morris, 81 Ill. App. 3d at 289.

¶ 35 During its deliberations, the jury asked the court whether a person could be convicted of burglary based on the actions of another, i.e., whether a person who possesses stolen property can be "presumed guilty of burglary even though he, himself, may never have illegally entered the building or removed the property." Morris, 81 Ill. App. 3d at 290. The trial court's written response stated: "Not a proper question! You must decide the case on the instructions given." Morris, 81 Ill. App. 3d at 290. On appeal, this court held that although the defendant failed to preserve the issue, the trial court's decision not to substantively respond to the jury's inquiry constituted reversible error because the jury had been instructed, over the defense's objection, that it could infer the defendant's participation in the burglary based on his possession of recently stolen items. Morris, 81 Ill. App. 3d at 290-91.

¶ 36 Defendant concedes that here, unlike in Morris, the court answered the jury's question. Still, defendant contends the court's response "was the functional equivalent of a non-answer because it shed no light on [the] jury's question and did not disabuse the jury of the notion that it could find [defendant] guilty of robbery based on the conduct of any of these other individuals."

¶ 37 We decline to ascribe such speculative meaning to the trial court's direct and clear response to the jury's question. In

contrast to the facts in Morris, the jury in the instant case did not have as its only alternative that it must convict defendant of robbery based on the act of another person; the State presented evidence to support a robbery conviction based on defendant's own acts and argued that theory of defendant's culpability. Although the jury heard evidence that others took property from the victim and that Carlton pleaded guilty to robbery, the jury was presented with evidence that defendant took money from the victim as well.

¶ 38 Defendant contends that if the jury believed, based on its question, that it could have convicted him of robbery on an accountability theory, "it more than likely did so." However, the jury was not instructed on accountability and the prosecution did not suggest an accountability theory for the robbery in its arguments to the jury. The court's response accurately stated the law that defendant could not be found guilty of the sex charge if he was not also found guilty of the robbery.

¶ 39 Defendant's position on appeal rests entirely on speculation as to the jury's reasoning, which is an inadequate basis for reversal. See People v. Spears, 112 Ill. 2d 396, 409 (1986) (supreme court will not "attempt to metaphysically divine a jury's collective intent from a single question that may well have only embodied the curiosity or concern of a single juror"); People v. Strong, 79 Ill. App. 3d 17, 25-26 (1979) (defendant's contention that verdict was result of confusion was "a matter of speculation

and a challenge to the mental processes by which the jury reached its verdict").

¶ 40 Without a clear or obvious error in the jury's instruction or the court's response to the jury's question, defendant has not met his threshold burden in plain error review. See Piatkowski, 225 Ill. 2d at 565. No error occurred here in the court's response to the jury's question.

¶ 41 Defendant's remaining contention on appeal is that this court should order the mittimus be corrected to reflect the correct offenses of which he was convicted. Defendant was convicted of three counts of aggravated criminal sexual assault, all of which reached the level of an aggravated offense due to their commission in the course of the felony of robbery.

¶ 42 The mittimus, however, incorrectly states that two of those three counts occurred pursuant to section 12-14(a)(1) of the Criminal Code of 1961 (720 ILCS 5/12-14(a)(1) (West 2008)), under which the sex offense is aggravated because a weapon was used during its commission. The State concedes that no evidence was presented at trial which established the use of a weapon so the mittimus must be corrected. Therefore, we instruct the circuit court to correct the mittimus to reflect that defendant's three aggravated criminal sexual assault convictions fall under the portion of the statute that involves a sexual assault during the

commission or attempted commission by the accused of "any other felony." 720 ILCS 5/12-14(a)(4) (West 2008).

¶ 43 Accordingly, we affirm the judgment of the trial court and order the mittimus to be corrected.

¶ 44 Affirmed; mittimus corrected.